

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
VIRGIL LONG, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civ. Action. No. 01-0010 (EGS)
)	
MICHAEL J. GAINES, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

REMEDIAL ORDER AND JUDGMENT

On September 27, 2001, this Court entered a comprehensive Memorandum Opinion and Order setting forth findings of fact and conclusions of law holding that the United States Parole Commission's parole revocation regulations, practices, and procedures violate the requirements of the Due Process Clause of the Fifth Amendment of the United States Constitution as set forth by the Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471, 484-86, 92 S. Ct. 2593 (1972). At that time, the Court withheld the entry of final judgment, pending the submission of a proposed compliance plan by defendants. On October 12, 2001, defendants submitted a proposed plan for complying with the mandates of the Constitution and this Court's Memorandum Opinion and Order. Plaintiffs subsequently filed objections to the plan, and on November 13, 2001, the

Court held a hearing relating to the scope of relief to be ordered. In order to fully respond to the issues raised at the November hearing, the parties submitted further briefs and proposed orders.

Upon consideration of the defendants' proposed compliance plan, the plaintiffs' objections thereto, the parties' proposed orders, the arguments of counsel at the November 13, 2001 hearing, and in light of the Court's September 27, 2001 Opinion and Order, the Court has determined that it is appropriate to grant final judgment and enter a permanent injunction against defendants. Furthermore, the Court will retain jurisdiction over this matter to ensure that defendants comply with the requirements of the Constitution and this Court's Memorandum Opinion and Order.

The U.S. Parole Commission's Compliance Plan

On October 12, 2001, defendants submitted an ambitious plan for complying with this Court's Memorandum Opinion and Order and the requirements of the Constitution. The plan sets forth new procedures to ensure that parole revocation proceedings will occur in a timely fashion and will comport with due process of law. Specifically, defendants propose the following:

- Parolees arrested for alleged violations will receive a

probable cause hearing no later than five days after the parolee's arrest.

- Full revocation hearings will occur between 50 and 65 days from arrest.
- Prior to the revocation hearing the Commission will disclose to the parolee all the evidence it intends to consider in determining whether a violation occurred and whether to revoke parole.
- A final determination and notice of action will be given to the parolee no later than 86 days after arrest.

The Plan includes other procedural mechanisms designed to protect the rights of parolees. Plaintiffs do not object to these substantive requirements proposed by defendants.

The Court is satisfied that the U.S. Parole Commission's Plan sets forth procedures that comply with due process as explained by *Morrissey v. Brewer*. 408 U.S. 471, 92 S. Ct. 2593 (1972). The Court once again commends defendants for recognizing and accepting that its current procedures violate parolees' constitutional rights, and for submitting a plan that attempts to remedy the substantial problems that the Commission has faced and continues to face.

Oversight and Compliance

In light of the Parole Commission's willingness to assist

the Court in formulating a proposal to comply with the Court's Memorandum Opinion and Order, the Court is cautiously optimistic that the Parole Commission will soon fully implement its proposed Plan and comply with the requirements of the Constitution. However, the lessons of past attempts at institutional reform weigh heavily against the easy implementation of change at this institution. Furthermore, as plaintiffs correctly point out, the task of remedying the pervasive and long-standing constitutional violations by the Commission detailed in the Court's Memorandum Opinion and Order, will be a challenging one in light of the Commission's current budget and resource constraints.

The Court is confident that the Commission will rise to meet this challenge. However, it is necessary for the Court to retain jurisdiction to monitor the Commission's progress and ensure that the present constitutional defects are remedied. The parties agree that a certain period of continued oversight by the Court is appropriate. The parties disagree, however, as to when that continued jurisdiction should be terminated.

Defendants have suggested that the Court retain jurisdiction to monitor the Commission's compliance for six months from the date of this Order. Plaintiffs, on the other

hand, argue that the Court should retain jurisdiction for six months from the time that the Commission demonstrates full compliance with the requirements of the Constitution.

Rather than set a deadline for compliance at this point, the Court will monitor the Commission's progress for at least the next eight months. The Commission shall submit monthly progress reports to the Court and to plaintiff's attorneys. At the end of this eight-month time period, the Court will hear from the parties as to the status of the Commission's compliance with the Plan and this Court's Order.

Conclusion

Having previously held that the U.S. Parole Commission's regulations, practices, and procedures with respect to parole revocation violate the Fifth Amendment of the United States Constitution, it is hereby

ORDERED that the Clerk of the Court enter **FINAL JUDGMENT** against defendants and in favor of plaintiffs; it is

FURTHER ORDERED that defendants are permanently enjoined to implement and comply with the Plan submitted to the Court on October 12, 2001, a copy of which is attached to this Order; it is

FURTHER ORDERED that implementation of the Plan shall commence immediately; it is

FURTHER ORDERED that defendants shall promulgate amendments to their regulations as necessary to bring those regulations into conformity with the Plan, this Order, the Order of September 27, 2001, and the United States Constitution, no later than 60 days from the date of this Order; it is

FURTHER ORDERED that defendants shall serve on the Court and on plaintiffs' counsel any proposed amendments to the Commission's regulations; it is

FURTHER ORDERED that plaintiffs shall have two weeks following the Commissions' proposal of any amended regulations to file with the Court any objections based on lack of compliance with this Court's Order of September 27, 2001 or with the Commission's proposed compliance Plan; it is

FURTHER ORDERED that defendants shall submit monthly reports commencing 30 days after the entry of this Order detailing the Commission's implementation of the Plan and compliance, or lack thereof, with the Plan's deadlines for probable cause determinations, revocation hearings, and the issuance of final notices of action; it is

FURTHER ORDERED that a hearing on compliance will be held on **Friday, July 19, 2002 at 10:00 a.m. in Courtroom One**; it is

FURTHER ORDERED that defendants shall file with the Court

an overall compliance status report and argument for continuation or termination of oversight no later than **Monday, May 20, 2002**. Plaintiffs shall file a response by later than **Friday, June 21, 2002**. Defendants shall file a reply by no later than **Friday, July 5, 2002**. These deadlines shall not be extended; it is

FURTHER ORDERED that the parties may apply to the Court, via motion properly served on all parties, for additional hearings regarding the adequacy of the monthly reports to the Court or the sufficiency of the regulations and practices promulgated by the Commission to implement this Order; it is

FURTHER ORDERED that the Court shall retain jurisdiction to enforce the terms of this injunction until further order of the Court.

IT IS SO ORDERED.

DATE

EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

Notice to:

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ORIGINAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGIL LONG, et al.,

Plaintiffs,

v.

Civil Action No. 01-0010 (EGS)

MICHAEL J. GAINES, et al.,

Defendants.

FILED

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NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

**UNITED STATES PAROLE COMMISSION'S PLAN
FOR IMPLEMENTING THE COURT'S ORDER OF SEPTEMBER 27, 2001**

The Court has ordered the United States Parole Commission to submit, by October 12, 2001, a plan to ensure that a District of Columbia parolee held in custody on a charge of parole violation has a final decision as to revocation of parole no later than 86 days after the date the parolee was arrested. The order also calls for ensuring that such a parolee receives adequate notice and discovery of adverse evidence, and that the ultimate decision-makers are informed of all of the parolee's arguments and evidence before a decision about the parolee is made. The Commission hereby submits the following plan pursuant to the Court's order.¹

¹This plan is submitted without prejudice to the defendants' right to appeal the Court's final judgment in this matter, which right is expressly reserved.

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Probable Cause Hearing. A parolee who is arrested on a charge of violating parole will be given a probable cause hearing in the District of Columbia jail no later than five days after the parolee's arrest, unless the parolee has been convicted of a new offense that will be determinative of the Commission's revocation decision. The parolee, when arrested, will be informed that a probable cause hearing will be held within five days, and will be notified of the reason for the hearing and of each charged violation of parole.² The probable cause hearing will be conducted by a Commission hearing examiner.³ The examiner will review the violation charges with the parolee, and will apprise the parolee of the evidence supporting the charges so that the parolee will have the opportunity to rebut the adverse evidence to show that probable cause does not exist.

At the conclusion of the hearing, the hearing examiner will determine whether there is probable cause to believe that the parolee has violated a condition of parole as charged, and the parolee will be so informed. If the hearing examiner finds that there is no probable cause to believe that the parolee has violated a condition of parole, the hearing examiner will order the release of the parolee from the custody of the parole violation

²This will be accomplished by continuing the Commission's present practice of requiring the officer executing the arrest warrant to give the parolee a copy of the warrant application form. The warrant application form will state that a probable cause hearing will be held within five days and will set forth (1) all charges against the parolee, (2) a list of the specific reports and other documents that support each charge, (3) the applicable procedural rights under the Commission's regulations, and (4) the possible actions the Commission may take.

³On September 20, 2001, the Commission voted to delegate to Commission hearing examiners the authority to make probable cause determinations. *See* 66 Fed. Reg. 51301 (October 9, 2001).

warrant and will reinstate the parolee to parole (or discharge the parolee from supervision if the parolee's sentence has expired).

As is presently required by the Commission's rules, the parolee may be represented at the probable cause hearing by an attorney provided by the Public Defender Service or obtained by the parolee.

The Commission will conduct probable cause hearings at least twice a week at the District of Columbia jail (Central Detention Facility).⁴

Revocation Hearing. If the hearing examiner at a probable cause hearing finds probable cause to believe that the parolee has violated a condition of parole, and the parolee is eligible for (and has requested) a local revocation hearing, the hearing examiner will immediately schedule, and inform the parolee of, the revocation hearing date. The revocation hearing date will be at least 50, but not more than 65, days after the date the parolee was arrested. After the probable cause hearing, the parolee (or the parolee's attorney) may, in writing, request an earlier hearing date, and the Commission will accommodate such a request if practicable.⁵

⁴The Commission intends to schedule probable cause hearings on Tuesdays and Fridays. The Commission will place a parolee on a docket when notified that the parole violation warrant has been executed. The Commission will fax to the Public Defender Service, at least once a day, a list of the parolees who have been placed on the next docket, together with a copy of the warrant application for each of those parolees.

⁵The procedure of scheduling a local revocation hearing at the probable cause hearing would not apply to a parolee whose parole violation has been established by the parolee's conviction of a crime (in which case a probable cause hearing would not be required), or to a parolee who admits all alleged violations at the probable cause hearing. In such situations,

Before the revocation hearing, the Commission will disclose to the parolee all information in the Commission's possession that it intends to consider in determining (1) whether there has been a violation of a condition of parole, and (2), if a violation of parole is found, whether to revoke parole.⁶ At the revocation hearing, the Commission will require the parolee's Community Supervision Officer (or a substitute) to be present and to testify from the Court Services and Offender Supervision Agency supervision file if needed. All other procedural rights at revocation hearings will remain as provided in the Commission's regulations.

Final Determination and Notice of Action. The examiner conducting the

reasonable ground for revocation is established and the only issue is the sanction for the violation. This will be determined under procedures adopted directly from 18 U.S.C. § 4214. Under 18 U.S.C. § 4214(c), if a parolee has been convicted of a crime, the parolee is entitled to a hearing at the institution at which the parolee is confined (called an "institutional revocation hearing"). The parolee receives notice of the hearing and, at the hearing, the parolee can testify, present evidence, and be represented by counsel. The procedure is the same for parolees who, at the probable cause hearing, admit the violation or who waive the revocation hearing. See 18 U.S.C. § 4214(c). The Commission tracks this procedure in 28 C.F.R. § 2.102(d). Reparole determinations (whether in connection with a local or institutional revocation hearing) are a separate matter and are governed by D.C. Code § 24-206(a) and 28 C.F.R. §2.81.

⁶The information disclosed to the parolee will include a copy of the Community Supervision Officer's letter requesting the warrant (which typically summarizes the parolee's supervision history), and the presentence investigation report that was prepared in connection with the case that resulted in the term of imprisonment from which the parolee has been paroled, if the Commission possesses that report. That report includes the parolee's criminal record. The Commission relies upon the presentence report for the background information that permits it to assess the predictive significance of the parolee's violation behavior, which in turn informs its judgment as to whether parole should be revoked. If disclosure of information would reveal the identity of a confidential informant or otherwise result in harm to any person, the Commission need not disclose that information. If that occurs, however, the Commission will provide the parolee with a summary of the information withheld.

revocation hearing will prepare a report of the hearing, which will include a summary of the parolee's evidence and arguments and the examiner's recommended decision. That report will be made a part of the parolee's file, as will any evidence or letters submitted on behalf of the parolee.

The report of the hearing examiner conducting the hearing, together with the parolee's file (including any evidence and letters submitted on behalf of the parolee), will be given to another hearing examiner for review. When two hearing examiners concur in a recommended disposition, that recommendation, together with the parolee's file (including any evidence or letters submitted on behalf of the parolee), and the hearing examiner's report of the hearing, will be sent to a Commissioner for consideration. A final determination occurs when two Commissioners concur in a disposition. Once there has been a final determination, a Notice of Action explaining the decision will be prepared and sent out. This will occur no later than 86 days after the arrest of the parolee.

Continuance of a Hearing. A request for a continuance must be made in writing. Any time taken up by a continuance will not be included in calculating the length of time it takes to obtain a final determination unless the continuance is justified by reason of the Commission's failure or inability to offer a hearing in compliance with its regulations.


At the request of the parolee (or the parolee's attorney), the probable cause hearing can be continued for up to 30 days. In the case of a continuance requested for the purpose of securing the presence of an adverse witness on contested charges, the Commission will

schedule a combined probable cause hearing and local revocation hearing to be held within 65 days of the parolee's arrest.

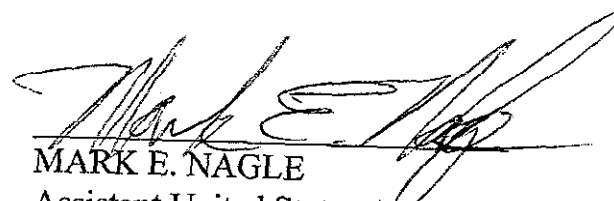
The parolee (or the parolee's attorney) may request a continuance of the revocation hearing, and the Commission will ordinarily grant a continuance if the request is made at least 15 days before the hearing. The Commission will grant a continuance requested after that time only for a compelling reason.⁷

If this plan is satisfactory to the Court and the plaintiffs, the defendants' counsel will confer with the plaintiffs' counsel to attempt to reach agreement as to the form of an order, embodying the foregoing points, which can be submitted to the Court for entry in connection with the Court's final judgment in this action.

Respectfully submitted,

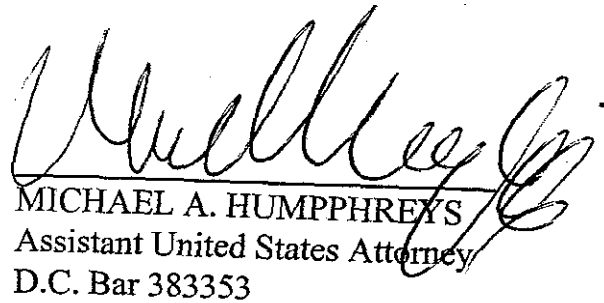

ROSCOE C. HOWARD, Jr.
United States Attorney
D.C. Bar No. 246470

⁷The Commission will have made final preparations for the hearing, including sending out subpoenas, approximately 15 days before the hearing. The more stringent standard is necessary to be able to avoid delays and other problems that result from the disruption in scheduling that occurs when a hearing is cancelled after those preparations have been made.



MARK E. NAGLE

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D.C. Bar No. 416364



MICHAEL A. HUMPPHREYS

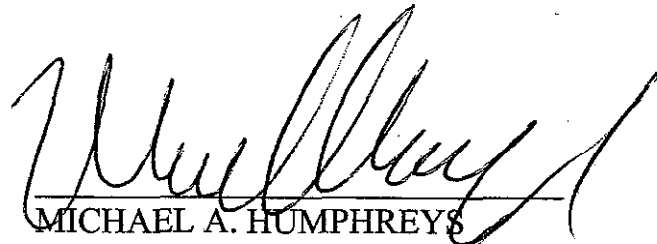
Assistant United States Attorney
D.C. Bar 383353

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Proposed Compliance Plan
has been made by hand-delivery to Plaintiff's counsel:

Steven C. Parker
Fried, Frank
1001 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C.
20004

on this 12th day of October, 2001.



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